IN THE

Supreme Court of the United States

No.
October Term, 1961

FEDERAL POWER COMMISSION,
Petitioner
versus
TENNESSEE GAS TRANSMISSION COMPANY, THE MANUFACTURERS LIGHT AND HEAT COMPANY, THE OHIO FUEL GAS COMPANY, and UNITED FUEL GAS COMPANY

BRIEF AMICUS CURIAE OF THE COMMONWEALTH OF PENNSYLVANIA AND THE PENNSYLVANIA PUBLIC UTILITY COMMISSION, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INTEREST OF AMICUS CURIAE

The Commonwealth of Pennsylvania and the Pennsylvania Public Utility Commission, an agency of the

Commonwealth, file this Brief pursuant to Rule 42(4) of the rules of this Court.

The Pennsylvania Public Utility Commission respectfully represents that it is a regulatory body of the Commonwealth of Pennsylvania, having jurisdiction to regulate rates and charges for the sale and distribution of gas pursuant to the Pennsylvania Public Utility Law, Act of May 28, 1937, P.L. 1053, 66 Purdon's Pennsylvania Statutes Annotated, 1101. This statute reposes in the Commission responsibility for the regulation of public utilities and for the preservation and protection of the public interest. The Pennsylvania Commission has an interest in any proceeding which affects the supply of natural gas and the rates charged to public utilities distributing gas within the Commonwealth of Pennsylvania.

Tennessee Gas Transmission Company is a major supplier of a number of such distributing companies and of their wholesale suppliers. The issues presented by the instant case, may have a substantial impact on the cost of gas to distributing companies and on the rates charged to ultimate consumers in Pennsylvania. Moreover, the outcome of such issues may affect action by the Federal Power Commission with respect to both pending and future proceedings involving rates of other natural gas companies supplying gas to distributing companies in Pennsylvania and their wholesale suppliers.

Because of the broad impact of any decision rendered in this case on the rates to be charged to ultimate consumers in Pennsylvania, we urge the Court to review the decision below (Reported at 293 F. 2d 761).

STATEMENT OF THE CASE

The Petitions for Writ of Certiorari request that this Court review a decision of the Fifth Circuit Court of Appeals which sets aside an order of the Federal Power Commission requiring an immediate reduction in rates and the refunding of that part of the increased rates collected subject to refund and found by the Commission's order to be excessive.

The history of the proceedings commencing with the order of the Federal Power Commission and the subsequent review by the Circuit Court are set forth in the Petition for Writ of Certiorari submitted by the Federal Power Commission.

REASONS FOR GRANTING THE WRIT

THE OPINION OF THE LOWER COURT RAISES THE QUESTION IN WHAT CIRCUMSTANCES THE COMMISSION WOULD BE JUSTIFIED IN ISSUING ITS INTERIM RATE ORDER

A. The Commission has full Authority to issue an interim rate order upon compliance with the mandates of the Act which have been judicially established.

The opinion of the lower court casts doubt upon both the authority of the Commission to issue an interim rate order and the legality of such an order where issues of cost allocation are unresolved. It is our contention that the Court's opinion rests on faulty reasoning and is contrary to established principles of law.

The Commission's authority generally to issue interim rate orders is derived from Sections 4 and 5 of the Natural Gas Act, June 21, 1938, 52 Stat. 822; Title 15 U.S.C. 717(c).

Section 4 (e) states in part:

> "After a full hearing . . . the Commission may make such orders with reference thereto (i.e., change in rate, charge, classification or service) as would be proper in a proceeding initiated after it had become effective. . . .[1] Where increased

[1] This section incorporates all the powers conferred upon the Commission by Section 5(a) of the Natural Gas Act.

> rates or charges are thus made effective (i.e., at the expiration of the suspension period on motion of the natural gas company making filing of a change in rate), the Commission may . . : upon completion of the hearing and decision [to] order such natural gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified."

The mandates contained in Section 4(e) require a full hearing and decision. These mandates have been judicially defined in *Pankandle Eastern Pipeline Co. v. Federal Power Commission*, 236 F. 2d 606 (C.A. 3); *State Corporation Commission of Kansas v. Federal Power Commission*, 206 F. 2d 690 (C.A. 8), cert. den. 346 U.S. 922; and *Federal Power Commission v. Natural Gas Pipeline Company*, 315 U.S. 575, 585.

In *Natural Gas Pipeline Company v. Federal Power Commission*, 120 F. 2d 625, the Circuit Court discussed the right of the Commission to issue an interim order and in so doing indicated the timeliness of such action:

> "We must, and do, hold that upon a proper showing, and when the hearing has reached a stage where the Commission may determine that a reduction (or an increase) of rates should be made, it may (and should) make such order, even though the hearing be not completed."

The Supreme Court, on review, *Federal Power Commission v. Natural Gas Pipeline Company*, supra, affirming the right of the Commission to issue an interim rate order also set forth what constituted a full hearing. There the Court held (315 U.S. 583-584):

". . . while the proceedings were not ended by the interim order, the companies had full opportunity to offer all their evidence both direct and in rebuttal, and full opportunity to cross-examine every witness offered by both the Federal Power Commission and the Illinois Commerce Commission. All the evidence tendered was received and considered by the Commission, and before the interim order was entered counsel for the companies stated to the Commission that they had concluded the direct testimony in support of their case. So far as the order is supported by the evidence the companies cannot complain that they were denied a full hearing because they had not been able to examine on redirect their own witnesses who had not been cross-examined, or because they had no opportunity to cross-examine or rebut witnesses who were not offered by the Commission. The right to a full hearing before any tribunal does not include the right to challenge or rely on evidence not offered or considered."

In *Panhandle Eastern Pipeline Co. v. Federal Power Commission*, supra, the utility objected to the Commission's order on the ground that a full hearing was not granted. The Third Circuit held (236 F. 2d at 608):

"Here the record shows that Panhandle was given full opportunity to offer all of its evidence in support of the items which the commission disallowed in the order now on appeal. Thereafter, the commission was under no obligation to postpone its ruling on those matters. Indeed, to have

done so would have permitted Panhandle to put into effect . . . increased rates, parts of which it had attempted and, in the commission's view, failed to justify."

It is apparent from the above authorities that the mandate requiring a "full hearing" is satisfied when the proponent of an increased rate has been permitted to introduce all of its evidence in chief on the issue or issues disposed of by the Commission's interim order.

B. The Commission has fully complied with the mandates of the Natural Gas Act.

The lower Court questions whether a "full hearing" had been afforded to Tennessee in accordance with the mandate of Section 4(e) of the Act. Tennessee was permitted to present its entire case. Its witnesses were cross-examined on the rate of return issue. Thereafter, other parties to the proceeding presented evidence on rate of return with subsequent cross examination. Tennessee then presented rebuttal testimony on rate of return, on which there was cross examination.

The Commission, accepting the determination by the examiner that there was no further evidence to be presented on rate of return, heard oral argument on this issue, as well as on whether interim rate reductions and refunds should be ordered.

The Commission considered Tennessee's entire presentation including its cost allocation methods, and issued its interim order thereon. All of the evidence having been introduced, the Commission was certain-

ly under no obligation to reserve its decision on rate of return until all other issues in the proceeding had been resolved. Tennessee cannot complain of injury as a result of the interim order if it has failed to justify the increased rates on the basis of its own theory and evidentiary presentation.

We submit that the Commission, having allowed Tennessee a full hearing with opportunity to present its case in chief, and having issued an interim order on the completed record, has fully complied with the mandates of Section 4(e) of the Act.

THE COMMISSION'S INTERIM REDUCTION ORDER WAS A REASONABLE AND APPROPRIATE EXERCISE OF ITS STATUTORY AUTHORITY

Section 4(e) of the Natural Gas Act provides, *inter alia*:

> "At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable, shall be upon the natural gas company . . ."

The plain meaning of this language is that the natural gas company must sustain the burden of proof and justify the entire amount of any rate increase. This burden cannot under any circumstances be shifted to the Commission. Should the natural gas company, after full hearing, not sustain this burden for the requested rate increase, the Commission is then empowered to order a refund by the natural gas company of that portion of the requested increase not justified.

In the instant case, Tennessee's evidence supported a rate of return of 6⅛% as compared to the requested rate of 7%. Therefore, the Commission was fully authorized to disallow the amounts claimed, but not justified by Tennessee. Moreover, the Commission was under no duty to show that any portion of the disallowed rates would be justified by further evidence on other issues in the proceeding.

The majority of the Circuit Court was of the opinion that the Commission's failure to resolve all issues

affecting the determination of just and reasonable rates would deprive Tennessee of due process of law and threaten them with irreparable harm should the ultimate rates established be in excess of the rates set by the interim order.

Our answer to this assertion is twofold. First, as has been previously noted, Tennessee had the burden of proof to justify the requested increase. The full hearing, as above defined, on this issue and the subsequent decision by the Commission based thereon, satisfied the requirements of procedural due process in accordance with Section 4(e) of the Act.

Second, the Court's apparent alarm with regard to the threat of irreparable injury to Tennessee is conjectural and does not support the conclusion that the Commission abused its discretion. The fears expressed reach out to cast the Commission's action in a light having the worst possible effect on Tennessee's revenues.

The Court has failed to give any consideration to the protections afforded Tennessee by the cost of service issues yet to be decided in this proceeding and other proceedings affecting Tennessee's suppliers. Thus, the speculative consequences predicted, ignore the fact that Tennessee pays large amounts for its gas supply subject to possible refund, and they likewise ignore the fact that the allowance of 6⅝% to Tennessee does not reflect the Commission's present policy of allowing a return of only 1½% on the company's reserve for accumulated deferred taxes.[2]

[2] See: *Northern Natural Gas Company et al.*, Docket G-19040 et al., Opinion No. 312, March 7, 1961, wherein the

Furthermore, the Court overlooked the fact that in practically every rate case the Commission makes substantial reductions in the claimed cost of service for items other than the rate of return.

In view of the foregoing, we submit that Tennessee's revenues already contain substantial amounts which will be available to meet any revenue requirement adjustments found necessary as a result of possible changes in the cost allocation method.

Notwithstanding the possibility that the Commission's final order on cost allocation may indicate that Tennessee is entitled to receive greater revenues than those collected under the interim order rates, we submit that Tennessee does not have a vested right to a 7% return which would be produced by their filed rates nor does Tennessee have a vested right to the overall revenues which would produce a 6.8% return. Although the Commission's order found a 6.8% return to be a just and reasonable return for Tennessee, which finding was affirmed by the lower Court, it is within the Commission's discretion to order rate decreases to the lowest reasonable rates.

Section 5(a) of the Act states:

> ". . . the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates."

Commission included in the cost of capital determination the reserve for accumulated deferred taxes at a return of 1.7%. The Commission was of the opinion that a return of 1.7% of moneys in the deferred tax account was a sufficient incentive to a regulated company to induce it to take advantage of the provisions of Section 167 of the Internal Revenue Code.

By long standing usage in the field of rate regulation the "lowest reasonable rate" is one which is not confiscatory in the constitutional sense.[3]

In this connection, the Court of Appeals for the Eighth Circuit stated in *Panhandle Eastern Pipeline Co. v. Federal Power Commission*, 143 F. 2d 488, 496:

> "The last question for consideration is whether the return allowed by the Commission has been shown to be unjust, unreasonable or confiscatory.
>
> "The opinion of the Supreme Court in the Hope Natural Gas Company cases indicates to us that, aside from questions relating to procedural due process and to jurisdiction, a reviewing court may interest itself only in the effect of the Commission's order. The court cannot concern itself with the Commission's choice of formulae or the propriety of the methods employed by it in reaching its conclusion, but only with the consequences of the order made. If the effect of the order is to deny to the utility a return sufficient reasonably to meet its necessities and to enable it to continue to render adequate public service, the order is arbitrary and confiscatory and may be set aside. It seems apparent that the Supreme Court is presently of the opinion that, within broad limits, the Federal Power Commission should be freed from judicial interference in regulating rates of natural-gas companies. It is evidently no longer necessary for a reviewing court to consider many

[3] See: *F.P.C. v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585; *Los Angeles Gas Corp. v. Railroad Commission*, 289 U.S. 287, 305.

of the doubtful and debatable questions which ordinarily arise in every rate case.

"The order of the Commission must be affirmed unless the petitioners have made a convincing showing that it is unreasonable in its consequences because the return allowed is insufficient to enable them to meet their expenses of operation, to pay interest on their bonds and dividends on their stock, to maintain their credit and to attract capital or is clearly out of line with the returns on investments in enterprises involving comparable risks."

If we assume, arguendo, that Tennessee fails to earn a 6⅛% return under the rates established by the interim order, no injury may be claimed unless the overall return is reduced to the level of confiscation.

On this point, the Supreme Court in *F. P. C. vs. Natural Gas Pipeline Co.*, supra, stated:

"Assuming that there is a zone of reasonableness within which the Commission is free to fix a rate varying in amount and higher than a confiscatory rate, the Commission is also free under Sec. 5(a) to decrease any rate which is not the 'lowest reasonable rate'. It follows that the congressional standard prescribed by this statute coincides with that of the constitution, and that the courts are without authority under the statute to set aside as too low any 'reasonable rate' adopted by the Commission which is consistent with constitutional requirements."

The lower Court, in the present case, invalidates the Commission's interim order on the assumption that

the retroactive effect of the final determination of the cost allocation issue will make it "highly unlikely, if not impossible, for a utility to earn a 'just and reasonable return'."

The Court not only fails to lay any foundation for this assumption, but has acted without the legal criteria declared necessary by this Court in the *Natural Gas Pipeline* case, supra.

We submit that the various means of protection available to Tennessee, coupled with the legal principles that rates not shown to be confiscatory cannot be set aside, clearly indicate that the reasoning of the Court below on the interim order issue is contrary to both fact and legal precedent and can not be sustained.

NECESSITY FOR UPHOLDING THE COMMISSION'S AUTHORITY TO ISSUE INTERIM RATE ORDERS

The Commission's interim rate order procedure is of great significance and import in effectuating the purposes which the legislature sought to accomplish with the passage of the Natural Gas Act. The primary purpose of the Act is to protect the consumer interests against exploitation at the hands of private natural gas companies.

The decision of the Court below would deny to the Commission a procedure (interim rate orders) to decide increased rate questions "as speedily as possible" in accordance with the mandate of Section 4(e) of the Natural Gas Act. Thus, the natural gas companies would be enabled to continue to collect excessive rates. Under the circumstances, consumer interests would not be fully protected as was intended by the Act.

Moreover, while the consumers are entitled to refunds of excess rates charged, together with seven percent (7%) interest, such a protection is not effective unless the Commission is permitted to dispose of its rate cases with rapidity. Unless reduced rates and refunds are ordered as soon as it is feasible, inequities will result in that those who benefit by the final determination will not necessarily be those ratepayers who contributed the excessive amounts.

Public utility rate cases are invariably intricate and protracted and often involve various difficult issues.

Although some issues require extensive study and investigation, others can be determined fairly promptly. The Commission, in recent months, has been grasping for methods and means of alleviating the regulatory lag and the resultant large sums of money which the natural gas companies have been collecting from their customers subject to refund. The interim order procedure is one of the Commission's methods of providing this prompt relief to the consumers of natural gas.

The effect of this decision upon the regulation of an industry which is growing by leaps and bounds, and the efforts of the Commission to afford expeditious relief to consumers of natural gas, is of such extreme importance that to abandon the interim order procedure would be a step in the wrong direction.

RESPONDENT'S BRIEF IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

Nos. ~~591~~ and ~~605~~

FEDERAL POWER COMMISSION,
Petitioner,
v.
TENNESSEE GAS TRANSMISSION COMPANY, THE MANUFACTURERS LIGHT AND HEAT COMPANY, THE OHIO FUEL GAS COMPANY AND UNITED FUEL GAS COMPANY,
Respondents.

CITY OF PITTSBURGH,
Petitioner,
v.
TENNESSEE GAS TRANSMISSION COMPANY, THE MANUFACTURERS LIGHT AND HEAT COMPANY, THE OHIO FUEL GAS COMPANY AND UNITED FUEL GAS COMPANY,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS, THE MANUFACTURERS LIGHT AND HEAT COMPANY, THE OHIO FUEL GAS COMPANY AND UNITED FUEL GAS COMPANY IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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BRIEF FOR RESPONDENTS, THE MANUFACTURERS LIGHT AND HEAT COMPANY, THE OHIO FUEL GAS COMPANY AND UNITED FUEL GAS COMPANY IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

Respondents, The Manufacturers Light and Heat Company, The Ohio Fuel Gas Company and United Fuel Gas Company (Columbia Companies) oppose the grant of writs of certiorari to review the judgment of the United States

Court of Appeals for the Fifth Circuit sought by petitions filed on December 8 and 11, 1961, by the Federal Power Commission and the City of Pittsburgh, respectively, and the brief amicus curiae of the Commonwealth of Pennsylvania and the Pennsylvania Public Utility Commission.

OPINIONS BELOW

The Opinions of the Court of Appeals for the Fifth Circuit are reported at 283 F2d 729 and 293 F2d 701. The opinion at 283 F2d 729 is the Court's denial of Respondents' motions for a judicial stay of the underlying administrative order. This opinion is pertinent to a full understanding of the effect of the Court's opinion on the merits at 293 F2d 701 of Respondents' petitions for review of the underlying administrative order. The Orders of the Federal Power Commission (Commission), are reported at 24 FPC 204 and 525.

QUESTION PRESENTED

Columbia Companies cannot agree with the scope or content of Petitioners' "Question Presented" sections. A more accurate statement follows.

Respondent natural gas company and its customers, including respondents Columbia Companies, have an unresolved controversy of long standing pending before the petitioner Commission in a prior collateral proceeding involving (a) the propriety of the natural gas company's method of allocating its cost of service among zones and classes of service within each zone and (b) the related issue of undue rate discrimination whereby certain customers are overcharged and other customers are undercharged. The determination of this controversy will substantially affect pending rate filings by the natural gas company and the proportions of its costs which will be borne by various

customers purchasing gas under a variety of classes of service in six rate zones.

The question which arises under this regulation and Sections 4 and 5 of the Natural Gas Act and Sections 5, 7, 8 and 12 of the Administrative Procedure Act is whether it is an abuse of discretion for the Commission to order immediate rate reductions without a full hearing and decision upon a method of cost allocation being contested by customers of the natural gas company upon the finding that the rate of return cost item in a natural gas company's cost of service is excessive.

STATUTES INVOLVED

In addition to the pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U. S. C. 717-717w, set out in Appendix B to the Petition of the Federal Power Commission, the pertinent provisions of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001-1011, are set out in Appendix A, *infra*, pages 1a-18a.

STATEMENT

For purposes of brevity, Columbia Companies at this stage of the proceeding adopt the statement set forth in the Petition of the Federal Power Commission, pages 3 to 8, with certain important exceptions and additions.

Tennessee Gas Transmission Company (Tennessee), the natural gas company whose rates are involved in the underlying administrative proceeding, transports and sells large amounts of gas to Columbia Companies in Tennessee's rate Zones 2 (Kentucky), 3 (West Virginia) and 4 (Ohio and Pennsylvania). Tennessee has three other rate Zones 1 (Texas), 5 (Kentucky), 6 (New York) and 6a (New England). Tennessee procures a variety of natural gas

services in these six rate zones to scores of wholesale customers who, in turn, sell gas to ultimate consumers and or to other companies for resale.

A. *The Controversy of Undue Rate Discrimination Was Raised Several Years Before Tennessee Filed for a 7 per cent Rate Of Return.* Tennessee expanded its service in its terminal Zones 1, 5 and 6 (including new markets in New York and New England) during the 1952-1958 period without substantial expansion of service to Columbia Companies. Contemporaneously, it filed successive rate increases which fell disproportionately upon Columbia Companies and other customers located in Zones 2, 3 and 4. Columbia Companies have steadfastly and strenuously complained to the Commission of undue rate discrimination in violation of Sections 4(b) and 5(a) of the Natural Gas Act.

Columbia Companies and others have complained that a basic cause of this discrimination is Tennessee's method of allocating its cost of service to zones and classes of service. This unresolved issue has been pending before the Commission in several administrative proceedings prior to the proceeding at Docket No. G-19983 which was reviewed by the Fifth Circuit. The issue has been handled by the Commission in the following manner:

1. *Docket No. G-5259.* Tennessee filed for rate increases in 1954. In an order issued October 6, 1955, the Commission recognized the controversy involving zone cost allocation and rate design. (R. 622) However, the cost allocation issue was not determined because that docket was settled. By order issued September 5, 1957, the Commission noted that the zoning issue was to be presented in the next succeeding rate case, Docket No. G-11980. (R. 622).

2. *Docket No. G-11980.* The rate increases in this proceeding became effective subject to refund on July 14,

1957. The Commission made it clear that its determination of principles and methods of cost allocation would extend to subsequent cases. (R. 109-6107) The controversy in G-11980 is still pending before the Commission after oral argument on exceptions to the Examiner's decision. None of the cost of service issues in this prior case have been determined. All phases of this proceeding are awaiting final administrative action.

3. *Docket No. G-17100.* Tennessee filed a "second layer" of rate increases (in addition to the G-11980 increments) effective May 15, 1959, subject to refund. No action has been taken by the Commission in this case, since the Commission, in effect, by passed it to hold hearings on the "third layer" rate case, Docket No. G-19983.

4. *Docket Nos. G-11107 and G-15820.* These were certificate cases in which, among other things, Tennessee sought Commission approval for peaking service rates which Columbia Companies contend aggravated an already existing rate preference in favor of Tennessee's customers in its Zones 5 and 6 in New York and New England. These cases are still pending before the United States Court of Appeals for the District of Columbia Circuit, Case Nos. 14897 and 15160. On September 21, 1959, that Court ordered these cases to be held in abeyance until further order of the Court. Obviously, that Court is awaiting the outcome of the controversy in Docket Nos. G-11980, et al.

5. *Docket No. G-19983.* Tennessee filed increased rates which became effective subject to refund on April 5, 1960. These rates remained in effect until November 1, 1960, and have since been superseded by lower rates pursuant to the Commission's order of August 9, 1960. The Fifth Circuit reviewed this order and ruled that "regardless of the Commission's authority to issue the order, we hold that cost allocation among zones is such an essential element in deter-

mining whether the filed rates are excessive that it is an abuse of discretion to issue an interim rate order before deciding a pending allocation issue ripe for decision." (R. 683-684)

B. *The G-19983 Hearing Before the Commission.* In the hearing below in Docket No. G-19983, none of the intervenors, including Columbia Companies, were permitted to introduce evidence on cost allocation. (R. 50-54, 291-295, 378-379)

The Commission was fully informed of the Examiner's refusal to permit such evidence. (R. 577-583, 607-625)

Although Commission Staff counsel "contemplated acceptance" by the parties to Tennessee's methods "for purposes of an interim order" in Docket No. G-19983, certain intervenors, including Columbia Companies, were *not* willing to accept Tennessee's methods for such purposes. Such methods had been and are being vigorously contested before the Commission in a prior proceeding, Docket No. G-11980, as well as being opposed in the underlying proceeding, Docket No. G-19983, for use by the Commission to lower rates which may already have been too low for certain localities and classes of service.

ARGUMENT AGAINST GRANTING WRITS

I. The Decision of the Court of Appeals Is Correct.

The Court of Appeals did not deny the authority of the Commission to issue interim rate orders in the proper case. It merely held that in this case it was "unreasonable and an abuse of discretion to issue an interim rate order before deciding a pending allocation issue ripe for decision." (R. 683-684)

The Court of Appeals recognized that both the filing company, Tennessee, and the intervening customer

> Commission can eliminate what it finds to be an unlawful increment in the price structure. *See State Corporation Com. of Kansas* v. *F. P. C.*, 8 Cir., 206 F.2d 690, cert. den. 346 U. S. 922."

By necessary implication, the majority of the Court believed that Columbia Companies were not to be relegated to a position of secondary priority in getting *their* "day in court" before the administrative tribunal. In contrast to the Fifth Circuit, Petitioners imply that only Tennessee, and not Columbia Companies, have procedural rights under the statutes. (See Commission Petition page 7; Pennsylvania brief page 9)

Columbia Companies submit that Petitioners' position is grounded in a fundamental misconception of the rate-making process for a natural gas company having a complicated zonal rate structure. Petitioners would take the determination of a lower "rate of return" (which fixes only one *cost* item in an over-all cost of service made up of many items) and translate aggregate lower *costs* directly into *rates*.* There are other steps in the rate-making process which come after the items of a cost of service are determined. These subsequent steps include cost allocation and rate design which are equally important and include a determination of the various portions of the total cost of service which each customer should share. This Court has recognized that there are steps of different character which are taken to establish rates for a regulated industry. The first step is to ascertain costs. A separate and distinct step

*Tennessee's claimed jurisdictional cost of service with a 7 per cent rate of return cost item is $294,537,001. With a 6% per cent rate of return the Commission asserts that these annual costs are reduced by over $11,000,000. (R. 590) Obviously then, this cost item is significant because on the final determination of Tennessee's rates, as applied to zones it can be used to remedy the inequities that exist because of undue rate discrimination.

is to make adjustments "so as to eliminate discriminations and unfairness. . . ." *F. P. C. v. Natural Gas Pipeline Co. of America*, 315 U. S. 575, 584, 62 S. Ct. 736, 742 (1942).

Petitioners apparently believe that for an interim period the Commission could by-pass an essential step by using a contested method of cost allocation. The Court of Appeals believed otherwise. The Court held that cost allocation among zones was an essential element in determining whether or not Tennessee's rates are too low or too high as to each customer.

Moreover, Petitioners state that the effect of the Commission's order requiring interim rates on the basis of a cost of 6.85 per cent rate of return and *Tennessee's* allocation methods would put Tennessee's customers in the same position as if Tennessee had originally filed rates on the basis of a 6.85 per cent rather than a 7 per cent rate of return. This is an erroneous concept. Columbia Companies submit that when Tennessee *voluntarily* filed higher rates in Zones 1, 5 and 6 for whatever combination of reasons, the customers in Zones 2, 3 and 4 were benefited substantially. This is so because the Commission lacks the authority under Section 5(a) of the Natural Gas Act to *compel* a natural gas company to *increase* its effective rates. Thus, when Tennessee voluntarily filed higher rates, it was a step which would tend to help correct the undue rate preference which Columbia Companies contend Tennessee has been giving its customers in Zones 1, 5 and 6.

II. There Is No Conflict Of Decision.

Petitioners assert that the decision in the instant case somehow conflicts with the ruling of this Court in *F. P. C. v. Natural Gas Pipeline Co. of America*, *supra*, and with the decisions by other courts of appeal in *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 230 F.2d 606

(1956, CA 3); and *State Corporation Commission of Kansas* v. *Federal Power Commission*, 206 F2d 690 (1953, CA 8), certiorari denied 346 U. S. 922.

While the cited cases involved interim rate orders, it is clear that the decision of the Fifth Circuit is consistent and does not conflict therewith. The Fifth Circuit held that the interim order procedure is improper under the circumstances existing in this case. Contrary to Petitioners' allegations, such procedure remains a tool available to the Commission if properly used.

No case cited by Petitioners involved a deferred cost allocation issue which could be applied retroactively to alter the results of the Commission's interim rate order. For example, the *Natural Gas Pipeline Co.* case, *supra*, related to a rate investigation by the Commission under Section 5(a) of the Natural Gas Act. The reduction of the company's rates to reflect the Commission's finding of a lower rate of return was final and could not be altered on a retroactive basis, since the Commission's power under Section 5 of the Act is restricted to orders having prospective effect only. Thus, a subsequent determination by the Commission of another issue could not operate to vary the result of the interim order.

In that case this Court was not asked to pass upon the propriety of the interim order procedure; rather, certain parties merely contended that "the order is invalid because the Commission did not itself fix reasonable rates as required by the Act but instead merely directed the companies to file a new rate schedule which would result in the prescribed reduction in operating revenues." (315 U. S. at 583) Since the appropriateness of the interim order procedure was not questioned under the factual circumstances of that case, as was done in the instant proceeding, there clearly can be no conflict of decision.

Also of importance is the fact that the *Natural Gas Pipeline Co.* case did not even touch upon the problems of cost allocation among rate zones and rate design. Thus, that case did not involve the important issues that were before the Commission below and reviewed by the Fifth Circuit. Moreover, not only is the *Natural Gas Pipeline Co.* case clearly distinguishable on this ground, but also it is authority for the proposition that parties must have "full opportunity to offer all their evidence both direct and in rebuttal, and full opportunity to cross-examine every witness. . . ." (315 U. S. 583-584.) Columbia Companies did not have this opportunity in Docket No. G-10083, and the controlling collateral case, Docket No. G-11980 is still pending before the Commission.

The *Panhandle* case, *supra*, likewise did not involve a deferred cost allocation issue which could be applied retroactively to disturb the Commission's interim order. To the contrary, it appears from the Court's decision that the problem of zone allocation had already been decided prior to the issuance of the interim order. (230 F2d at 611.)

The issue in the *Panhandle* case was completely unrelated to the problem involved in the instant proceeding. Panhandle's objection before the Third Circuit did not relate to the effect of some deferred issue upon the interim order. The company merely asserted that the order was invalid since it prevented the parties from making a supplementary showing as to recent developments and changes in circumstances occurring during the pendency of the total rate proceeding. (230 F2d at 608.)

State Corporation Commission of Kansas v. *Federal Power Commission*, *supra*, involved a natural gas system which was not even zoned at the time the Commission issued the interim order under review. Certain parties to the proceedings had presented evidence proposing zone rates.

The Commission declined to decide the question due to the inadequacy of the evidence and designated a subsequent case, Docket No. G-1881, as being appropriate for the exploration of the problem of zone rates. (206 F2d at 712)

Since the Commission determined that the problem of zone rates should be decided in a separate future proceeding, it is clear that its interim order could not be affected thereby and could be considered final as to the issues decided.

Moreover, an examination of the opinion by the Eighth Circuit indicates that no objection was raised as to the propriety of the interim order procedure as such under the facts of that case. The company involved, Northern Natural Gas Company, apparently made no showing as to any possible harm that could flow to it, retroactively or otherwise, as a result of the interim order, judging from the Court's statement that "We are not shown any particular in which Northern was prejudiced by the Commission's action. . . ." (206 F2d at 716)

Clearly, the facts and issues in the present case are quite different from those which existed in the decisions relied upon by Petitioners. It cannot be validly asserted, therefore, that the decisions are at variance.

Columbia Companies submit that there is no conflict in decision or principle—either direct or indirect—upon which this Court could issue the writs sought. The cases cited by Petitioners are fully and substantially distinguishable from this case.

III. It is Important That The Decision Below Stand.

Columbia Companies (and Tennessee) unsuccessfully sought a judicial stay of the interim rate reduction and refund order of the Commission. The Fifth Circuit's order denying stay was issued October 28, 1960. (R. 630-632)

As a result of this denial Tennessee has reduced its rates as of April 5, 1960, which lower rates are still in effect as of the present time.* In addition Tennessee made refunds for the period from April 5, 1960 through October 31, 1960. Thus, there has been no correction of the undue rate preference granted Zones 1, 5 and 6 by Tennessee and aggravated by the interim reductions in those zones. The situation prevails and cannot be corrected except for the future. It is important, therefore, that the decision by the Fifth Circuit take effect as soon as possible so that the Commission will permit Tennessee to apply higher rates for those zones to be effective prospectively.

IV. The Petitions Raise Matters Extraneous to the Record.

Columbia Companies submit that the proponents of the Petitions reveal the weakness in their position by the very fact of the extreme charges they make against the natural gas industry as a whole and their excursion into matters entirely extraneous to the record and irrelevant to the problem which the Court of Appeals decided.

For example, after prejudging rate increases filed by natural gas companies as "excessive," the contention is made that revenues from excessive rate increases are used as a "relatively cheap source of expansion capital." (Commission Petition, page 11.) This generality is false. Natural gas companies do not deliberately overtile as the Commission implies. It would be most unwise for a natural gas company to do so. If it did, charges which would be ordered to be refunded after Commission consideration would not be available for investment in full, since about *half* of such overcol-

*Respondent, The Manufacturers Light and Heat Company, has passed through refunds to Pennsylvania customers and has adjusted its rates accordingly to reflect the lower interim rates of Tennessee. The implications to the contrary on page 4 and footnote 3 of Petition of City of Pittsburgh are in error.

lections would be paid out as income taxes. However, 7 per cent interest must be paid on the *total* amount of refund whether money refunded had been available for investment or not. This is a significantly higher capital cost than that applicable to debt capital of almost all pipelines, even after taxes.*

Thus, for example, if there was an overcharge of $1,000,000, only $500,000 would be available for investment for expansion. This $500,000 "investment" would require interest at 14 per cent to cover the 7 per cent interest on a $1,000,000 refund. This is a high cost of money in view of the Commission's determination that Tennessee is entitled to only 6⅛ per cent rate of return over-all and slightly over 10 per cent on equity.

As an additional example of the extremes to which Petitioners go, the City of Pittsburgh raises the admittedly irrelevant fact that under Section 4(e) of the Natural Gas Act the Commission has no authority to suspend the rates for sale of gas for resale for industrial use only. (Pittsburgh Petition, pages 16-17, fn. 7).

Likewise, the rate case statistics cited by Petitioners in attempting to fabricate a reason that would persuade this Court to take jurisdiction are irrelevant to *this* case.

Columbia Companies appear before the Commission continuously in certificate and rate proceedings of their own and are most interested in administrative speed. However, the statutes under which the Commission and administrative litigants operate require that administrative action be *deliberate* on evidence presented as well as quick. Otherwise, there is no reason for the decisional process on a full evidentiary hearing granted to all interested parties.

Columbia Companies submit that the effect of the Petitions is an attempt to get this Court to rewrite the

*The interest rates on pipeline bonds and debentures rarely exceed 5¾ per cent (an effective rate of about 2.875 per cent for corporations in the 52 per cent tax bracket).

controlling statutes by creating a judicial precedent which would nullify the clear provisions of the Natural Gas Act and Administrative Procedure Act. Congress has the law making function and it has not seen fit to change the statutes so as to radically change the administrative process by approving administrative fiat and inequality of treatment of litigants. Columbia Companies support speed in the administrative process but only on condition that due process of law is not destroyed thereby. The interim order procedure is a valuable tool in some proceedings and circumstances but not in the case below.* An even better tool would be a quick determination of all issues in each rate case by such things as the use of conference and settlement techniques.

It is submitted that matters extraneous to *this* case and involving other companies and other rate cases are not a proper ground for the Court to grant writs of certiorari herein.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petitions for the writs of certiorari should be denied.

Respectfully submitted.

BROOKS E. SMITH

January 8, 1962

*Even though interim rate orders are sometimes proper, there are numerous basic evils in piecemeal rate regulation occasioned by delays in final determinations before the administrative body and, if contested, delays due to a multiplicity of piecemeal judicial reviews. (Cf. *Cobbledick, et al.* v. *U. S.*, 309 U. S. 323, 325 (1940).)

APPENDIX A

The Administrative Procedure Act, 60 Stat. 237, 5 U. S. 1001 *et seq.*, provides, in pertinent part, as follows:

Section 5(b) "The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title." (5 U. S. C. § 1004(b), June 11, 1946, c. 324, § 5, 60 Stat. 239)

Section 7(c) "Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form." (5 U. S. C. § 1006(c), June 11, 1946, c. 324, § 7, 60 Stat. 241)

Section 7(d) "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for

decision in accordance with section 1007 of this title and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary." (5 U. S. C. § 1006 (d), June 11, 1946, c. 324, § 7, 60 Stat. 241)

Section 8 (b) "Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof." (5 U. S. C. § 1007 (b), June 11, 1946, c. 324, § 8, 60 Stat. 242)

Section 12 Impairment of rights; effect on other laws; *separability; subsequent legislation; effective date*

"Nothing in this chapter shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this chapter or the application thereof is held invalid, the remainder of this chapter or other applications of such provision

shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this chapter through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this chapter except to the extent that such legislation shall do so expressly. This chapter shall take effect three months after its approval except that sections 1006 and 1007 of this title shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 1010 of this title shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement." (5 U. S. C. § 1011; June 11, 1946, c. 324, § 12, 60 Stat. 244)